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# Reforming High-Stakes Police Departments: How Federal Civil Rights Will Rebuild Constitutional Policing in America

by IVANA DUKANOVIC\*

## Introduction

When eighteen-year-old Michel Brown was fatally shot by Officer Darren Wilson in Ferguson, Missouri, in August 2014, the small St. Louis suburb erupted. Brown's shooting set off weeks of racially charged protests and clashes between protestors and police, further exacerbated by the controversial decision not to indict Officer Darren Wilson. Subsequently, hopes for justice shifted to the federal investigations into the shooting—one criminal and the other civil.

Even though the criminal case against Officer Wilson was quickly closed,<sup>1</sup> the broader civil rights investigation into the entire Ferguson Police Department uncovered vast systematic and constitutional deficiencies. Following 100 days of onsite investigation, countless ride-alongs, and review of over 35,000 pages of police records, the Justice Department found that the Ferguson Police Department stressed and reinforced revenue generation and racial bias at the expense of lawful, constitutional policing.<sup>2</sup> The results of the civil investigation will lead to significant changes within the department and set the tone for future state and local police department overhauls.

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\* J.D. Candidate, 2016, UC Hastings; B.A., 2012, University of Southern California. I would like to thank Professor Evan Tsen Lee, who has provided me with invaluable and sincere academic and professional guidance. Also, many thanks to Professor Stephen Rushin of the University of Alabama School of Law whose research inspired this Note and Detective Sergeant Brendan Kolding of the Seattle Police Department who provided the police perspective regarding federal reform. Lastly, thank you to my loving parents, Ivo and Zorica, whose endless love, support, and encouragement motivates me each and every day.

1. Evan Perez & Wes Bruer, *Justice Department: No Darren Wilson Charges*, CNN (Mar. 4, 2015, 8:19 PM), <http://www.cnn.com/2015/03/04/politics/ferguson-darren-wilson-justice-department-report/>.

2. DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015) [hereinafter FERGUSON REPORT].

The civil investigation was initiated under a little known statute: 42 U.S.C. § 14141. Under § 14141, the U.S. Attorney General has authority to usher in structural reform litigation against local police departments. Enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, the statute enables the Department of Justice (“DOJ”) to sue a police department when “a pattern or practice of conduct by law enforcement officers . . . deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”<sup>3</sup> In effect, the statute serves as a civil mechanism for instituting constitutional policing through the investigative and judicial processes.

A pattern-or-practice investigation under § 14141 is a civil, rather than criminal, inquiry. It seeks to determine if there are systematic problems in specific police departments and results in equitable or declaratory relief to eliminate the pattern or practice.<sup>4</sup> While ideal in theory, the statute lacks effective, long-term enforcement due to three crucial and oftentimes conflated missing ingredients: (1) aggressive enforcement, (2) political will to intervene,<sup>5</sup> and (3) DOJ resources to fight pushback, reform-resisting police departments.<sup>6</sup> Deficiencies aside, reforming departments plagued with unconstitutional policing must take priority over punishing individual officers.

Not all departments welcome structural reform. These departments, also known as pushback departments, challenge the constitutionality of all-encompassing DOJ oversight and the evidence needed to prove an “unconstitutional pattern or practice.”<sup>7</sup> While the Supreme Court has previously expressed the importance of local control in law enforcement matters,<sup>8</sup> times have changed. The inception and proliferation of § 14141 has enabled what some call a federal strong-arming of the classic and

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3. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 210401, 108 Stat. 1796, 2071 (codified at 42 U.S.C. § 14141 (2006)).

4. *Id.*

5. Under former Attorney General Eric Holder, prosecutors opened more than twenty pattern-or-practice investigations nationwide—more than under any other serving Attorney General. See Simone Weichselbaum, *Policing the Police*, THE MARSHALL PROJECT (May 26, 2015, 6:12 PM), <https://www.themarshallproject.org/2015/04/23/policing-the-police#.TtDL7eWDz>.

6. Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 516–19 (2008).

7. See, e.g., *United States v. Johnson*, 28 F. Supp. 3d 499 (M.D.N.C. June 20, 2014) (challenging the § 14141 civil suit brought against the Alamance County Sheriff’s Office and moving for summary judgment).

8. Expressing the Supreme Court’s solicitude and concern for the importance of local control in law enforcement matters, see *City of Los Angeles v. Lyons*, 461 U.S. 95 (1981); *Rizzo v. Goode*, 423 U.S. 362 (1976); *O’Shea v. Littleton*, 414 U.S. 488 (1974).

traditional local police power. Yet, successful reforms in Los Angeles and Seattle demonstrate otherwise. Welcome or not, effective federal reform requires reform-minded local leadership, front-line officer buy-in, and long-term strategies for accountability and sustainability that benefit *both* officers and community members.

This Note uses the Ferguson Police Department as a § 14141 case study and provides suggestions and predictions for sustainable law enforcement reform. The Note proposes that § 14141 is *the* change agent for organizations that refuse or deny a need for change. Part I explains what tools the DOJ possesses for initiating structural police reform within the bounds of the Constitution. Relying on past § 14141 investigations and actions, Part II profiles the types of organizations likely to adopt change as well as those that will insist on pushback. Given that post-reform sustainability is one of the largest obstacles in § 14141 reform, Part III then proposes backup plans for the DOJ if federal intervention falters ten years after reform is initiated. Part IV predicts successes and potential pitfalls of § 14141 reform in Ferguson and discusses why Ferguson has potential to set an example for incremental restructuring of high-profile, problematic police departments. Lastly, Part V presents constitutional objections to strong use of § 14141, rooted in case law that no longer exhibits the realities and appropriate remedies required of twenty-first century policing in America.

Overall, the goal of this Note is to highlight that police reform is most effective when it involves simple adherence to rules and selective use of § 14141. This allows for incremental acceptance of organizational change. Furthermore, federal reform draws global attention to systemic issues infiltrating and festering in police departments and encourages other jurisdictions to preemptively make improvements so as not to face federal investigation. Ultimately, changing high-stakes, unconstitutional law enforcement agencies starts with a provision buried in the Violent Crime Control and Law Enforcement Act of 1994. Section 14141 provides just enough push without severe finger pointing and blame shifting—giving both sides reason to reform.

## **I. Police Misconduct: What the DOJ Can Really Do?**

Historically, the DOJ is one of the few federal entities with oversight over local and state police departments. Federal intervention, however, can produce hostility in some police departments and suggested changes are often politically unpopular. Currently, the DOJ Civil Rights Division has major political reinforcement. During the Obama administration, congressional funding for the division increased twenty-six percent—

totaling \$144.2 million at the end of 2014.<sup>9</sup> But these funds whittle away quickly considering the division works to uphold the civil and constitutional rights of all Americans that are discriminated against.<sup>10</sup>

Although the vast majority of law enforcement officers in this country perform their difficult jobs in accordance with the law, there have been blatant incidents where this is not the case. In such incidents, the DOJ Civil Rights Division can demand change and address police misconduct through a number of criminal or statutory paths,<sup>11</sup> some more productive than others.

### A. The DOJ's Criminal Versus Civil Tool Box

If police misconduct rises to the level of a criminal offense, the DOJ often utilizes two statutes: 18 U.S.C. §§ 241 and 242. Under these federal criminal statutes, it is a crime for one or more persons acting “under color of law”<sup>12</sup> to willfully deprive or conspire to deprive another person of any right protected by the Constitution or laws of the United States.<sup>13</sup> However, criminal charges against individual officers under either of these statutes are difficult to obtain and rarely successful.<sup>14</sup> This is often attributed to certain realities of police prosecution: Jurors are usually more sympathetic to police officers than criminal defendants, police are

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9. Lisa M. Noller & Daniel Werly, *DOJ Is Facing Tough Task in Ferguson Probe*, NAT'L L.J. (Oct. 20, 2014), <http://www.nationallawjournal.com/id=1202673640437/DOJ-Is-Facing-Tough-Task-in-Ferguson-Probe?slreturn=20150121150010>.

10. *About the Division*, DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION, <http://www.justice.gov/crt/about/> (last visited Mar. 27, 2016) (noting the division allocates funds to tackle discrimination on the basis of race, sex, disability, religion, familial status, and national origin).

11. Private civil litigation under 42 U.S.C. § 1983 is the most common cause of action involving police misconduct but is brought by *private* citizens—not the DOJ. See 42 U.S.C. § 1983 (2016) (“Every person who, under color of [the law] subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.”). In terms of reform, a successful § 1983 suit is a drop in the bucket. See Alexandra Holmes, *Bridging the Information Gap: The Department of Justice's “Pattern or Practice” Suits and Community Organizations*, 92 TEX. L. REV. 1241, 1245–46 (2014).

12. “Color of law” implies a misuse of power made possible because the wrongdoer is clothed with the authority of the state. *Color of law*, BLACK'S LAW DICTIONARY (10th ed. 2014). In other words, it means the individual is using power granted to him through local, state, or federal agencies, as is the case with police departments.

13. 18 U.S.C. § 242 (2016) (making it a federal crime for a police officer to violate a person's constitutional or civil rights and implementing hefty criminal penalties for such deprivation); 18 U.S.C. § 241 (2016) (making conspiracy against individuals' constitutional or legal rights illegal). Unlike most conspiracy statutes, § 241 does not require that one of the conspirators commit an overt act prior to the conspiracy becoming a crime.

14. Holmes, *supra* note 11, at 1247.

unwilling to testify against fellow officers,<sup>15</sup> and prosecutors are hesitant to bring charges against officers with whom they may work with on a regular basis.<sup>16</sup>

Under §§ 241 and 242, prosecutors can shift the blame of an entire agency onto one or two bad eggs within a department and avoid top-down substantive organizational reform.<sup>17</sup> This creates a sledgehammer impact. That is, by singling out and heavily punishing a single bad officer or small group of officers, the government does not fulfill one of the ultimate goals of punishment within the criminal system: deterrence. There is no concrete connection between the punishment of one officer and his bad acts compared to the unconstitutional practices of an entire police department. Though powerful against the individual officer, criminal punishment of officers only serves the undesirable goal of finger pointing and blame shifting, rather than remedying department-wide misconduct. Therefore, even if the DOJ is able to successfully bring and win such a suit, there is no guarantee that it will deter future conduct department wide.

In comparison, civil cases involving official misconduct are usually brought against the police department as a whole. For instance, the DOJ can implement police reform and incentivize departments to change by way of leveraging federal funding. Together, 42 U.S.C. § 2000d<sup>18</sup> and 42 U.S.C. § 3789d<sup>19</sup> prohibit discrimination on the basis of race, color, national origin, sex, and religion by state and local law enforcement agencies that receive financial assistance from the DOJ.<sup>20</sup> These civil rights statutes can be effective, considering that most communities, including Ferguson, are served by a police force that receives federal funds.

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15. See Myriam Gilles, *Keeping Quiet, Covering Up and Never, Ever Ratting: The Effects of the Code of Silence on Reforming Police Culture*, 2003 WL 22002097, 1 (2003).

16. *Id.*; see also Holmes, *supra* note 11, at 1246–47.

17. POLICE EXECUTIVE RESEARCH FORUM, CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED 2, 16 (2013) (“Research has long suggested that a small percentage of police officers account of a high percentage of use-of-force incidents.”).

18. 42 U.S.C. § 2000d (2016) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

19. 42 U.S.C. § 3789d (2016) (providing, similar to 42 U.S.C. § 2000d, a prohibition against discrimination within federally-funded agencies and departments).

20. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, *Addressing Police Misconduct Laws Enforced by the Department of Justice*, <http://www.justice.gov/crt/about/spl/documents/polmis.php>. The official misconduct that often triggers § 2000d and 3789d includes: harassment by way of racial slurs, unjustified arrests, discriminatory traffic stops, use of excessive force, or refusal by an agency to respond to complaints alleging discriminatory treatment by its officers.

Under these civil laws, the DOJ may seek changes in department policies and procedures, as well as individual restitution for victims. The problem, however, is that these statutes do not necessarily demonstrate that a department's activity was unconstitutional. For this reason, these claims are often brought in conjunction with § 14141 complaints to ensure on-the-ground investigation and surveillance of police departments engaging in unconstitutional practices. This means that absent § 14141, it is difficult for the government to assess real-time departmental violations. Therefore, while the DOJ's criminal options for police misconduct are somewhat heavy-handed, the civil sanctions hardly permeate the surface of unconstitutional policing.

**B. The Real Fix: Restructuring Police Departments with 42 U.S.C. § 14141**

Instead of sledgehammering into one bad officer or gently land leveling an entire police department, a thorough remodeling is needed for departments that promote unconstitutional practices and procedures. The answer—§ 14141—came as a result of the egregious Rodney King incident in 1994, after which Congress granted the DOJ the power to open multiyear audits of police departments accused of unconstitutional practices and civil rights violations.<sup>21</sup> Section 14141 makes it unlawful for “any governmental authority . . . to engage in a pattern or practice of conduct by law enforcement officers or by officials . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.”<sup>22</sup> The statute, therefore, makes it unlawful for police officers, state or local, to engage in a pattern or practice of conduct that deprives any person of a constitutional right.

In effect, the statute authorizes the Attorney General to conduct investigations and initiate civil litigation when there is reasonable cause to believe a problematic pattern or practice exists within a police department. The Attorney General has delegated this authority to the DOJ's Civil Rights Division, specifically the Special Litigation Section (“SLS”).<sup>23</sup> Among other things, the SLS is responsible for enforcing § 14141 investigations and litigation.<sup>24</sup>

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21. 42 U.S.C. § 14141 (2016).

22. *Id.*

23. *About the Division*, DEP'T OF JUSTICE: SPECIAL LITIGATION SECTION, <http://www.justice.gov/crt/about/spl/> (last visited Mar. 27, 2016).

24. *Id.*

SLS receives thousands of complaints and referrals regarding alleged police misconduct every year.<sup>25</sup> It reviews all allegations of misconduct and determines first whether the allegation establishes a violation of federal law, and then, whether that conduct constitutes a pattern or practice under § 14141.<sup>26</sup> Section 14141 focuses on violations of citizens' civil rights, including excessive force, unlawful stops, and racially discriminatory harassment.<sup>27</sup> The behavior must constitute a "pattern or practice" in order to implicate the law. That is, it must consist of more than one isolated incident and the DOJ must be able to prove before a federal court that the "incidents constituted a pattern of unlawful conduct."<sup>28</sup> To trigger federal reform, the DOJ must establish that "racial discrimination was the [] standard operating procedure"<sup>29</sup> in the department.

Unlike monetary relief for victims,<sup>30</sup> the relief in a § 14141 civil action is injunctive and usually includes a court order listing required police department changes. Aside from providing a blueprint for proper, constitutional policing, § 14141 also serves as a deterrent because the effects are pricy.<sup>31</sup> These investigations and lawsuits are expensive for both the DOJ and the targeted police department.<sup>32</sup> The mere threat of federal intervention raises the expected costs of misconduct and motivates proactive reform in departments not yet under investigation.<sup>33</sup>

### 1. *The Pattern-or-Practice Investigative Process*

Section 14141 civil litigation progresses in six stages: (1) case selection, (2) preliminary inquiry, (3) formal investigation, (4) settlement

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25. Holly James McMickle, *Letting DOJ Lead the Way: Why DOJ's Pattern or Practice Authority Is the Most Effective Tool to Control Racial Profiling*, 13 GEO. MASON U. CIV. RTS. L.J. 311, 324 (2010). The allegations, and underlying information, are produced by everyday individuals, organizations, advocacy groups, attorneys, police officers, judges, journalists, and even from the police departments or jurisdictions themselves.

26. *Id.* at 323–34.

27. *Laws Enforced by the Department of Justice*, *supra* note 20.

28. See *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (setting a high bar for the pattern or practice requirement in the context of Title VII suits); see also *Laws Enforced by the DOJ*, *supra* note 20 ("The DOJ must be able to show in court that the agency has an unlawful policy or that the incidents constituted a pattern of unlawful conduct. However, unlike the other civil laws discussed below, DOJ does not have to show that discrimination has occurred in order to prove a pattern or practice of misconduct.").

29. *Int'l Brotherhood of Teamsters*, 431 U.S. at 336.

30. See *supra* Part I.B (discussing DOJ avenues for obtaining monetary relief for civil rights victims).

31. Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 44 (2012).

32. *Id.* at 52.

33. *Id.* at 44–45.



negotiations, (5) appointment of monitor, and (6) monitored reform.<sup>34</sup> Professor Stephen Rushin, an expert in police reform, continues to make strides in the scholarship and literature pertaining to structural police reform under § 14141. In a recent article, he builds a thorough description of how the structural police reform process under § 14141 unfolds.<sup>35</sup> This Subpart introduces the general steppingstones of a standard pattern-or-practice investigation to provide context for the Note's thesis and analysis of Ferguson's reform.

There are 20,000 police and sheriff departments in the nation.<sup>36</sup> This begs the question: how does the DOJ decide which of the 20,000 departments is ripe for case selection under § 14141? Applying empirical methods, such as in-depth and anonymous interviews with major community stakeholders<sup>37</sup> in the reform process, Rushin uncovered five primary considerations that the DOJ relies on for § 14141 case selection: (1) existing civil litigation or private interest group investigations, (2) major media reports, (3) research studies, (4) whistleblowers within police departments, and (5) particularly egregious individual incidents of misconduct.<sup>38</sup>

The DOJ then examines public sources to conduct a private and confidential preliminary inquiry into practices and procedures.<sup>39</sup> At this point in the process, the DOJ is very particular in pointing out that it is conducting an "inquiry," not an investigation. This is because mislabeling the situation as an "investigation" prematurely opens up the department to media criticism.

If this initial inquiry uncovers the possibility of persistent police misconduct in a department, the DOJ moves on to the meat of the matter—a formal investigation. These formal investigations are expensive, time-consuming, and subject to public knowledge and scrutiny.<sup>40</sup> During formal investigation, the DOJ takes inventory of departmental policies and

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34. Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1367 (2015).

35. See generally *id.* (detailing the step-by-step process involved in § 14141 reform from beginning to end).

36. *Data Collection: Census of State and Local Law Enforcement Agencies*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=dcdetail&iid=249> (last visited Mar. 22, 2016).

37. Rushin, *supra* note 34, at 1365. "These stakeholders fall into three different categories: DOJ litigators, external monitors, and police officials." *Id.*

38. *Id.* at 1369 (noting the fifth option occurs only in rare circumstances).

39. See Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3247 (2014) (explaining how DOJ civil rights lawyers review available data, examine news reports, and interview community members during the preliminary inquiry stage).

40. Rushin, *supra* note 34, at 1370.

procedures, from training and discipline to reported and unreported uses of excessive force.<sup>41</sup> It also sifts through community complaints and conducts interviews with citizens, police chiefs, and frontline officers within the department.<sup>42</sup> DOJ attorneys do not conduct investigations on their own; they outsource work to police experts, who partake in ride-alongs, review police policy manuals, and observe police training.<sup>43</sup>

As of 2015, the DOJ has initiated sixty-seven formal investigations, averaging about three investigations per year since 1997.<sup>44</sup> If the formal investigation reveals a pattern or practice of abusive, unconstitutional conduct, the DOJ releases a letter to announce its findings publicly.<sup>45</sup> From there, technically, the DOJ can bring a civil lawsuit against the police department and eventually bring the claim to court.<sup>46</sup> In practice, however, the DOJ almost always settles with departments in violation of § 14141.<sup>47</sup>

## 2. *Settlement and Enforcement: What Is a Consent Decree and Why Does It Work?*

When a pattern or practice is established, the DOJ has options for legally enforcing organizational and systematic reform of those unconstitutional patterns or practices. First, the DOJ may file a lawsuit against the police agency, which will likely result in lengthy litigation. The second, and more frequently applied option, is to file a lawsuit with the expectation that it will settle, either with a consent decree or a memorandum of agreement (“MOA”).<sup>48</sup> Although both consent decrees and MOAs are forms of settlement negotiations between the DOJ and the local police agency, a consent decree is referred to as an “MOA with teeth.”<sup>49</sup>

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41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1371. Nine remain unresolved. Kimbriell Kelly et al., *Forced Reforms, Mixed Results*, WASH. POST (Nov. 13, 2015), <http://www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results/>.

45. See, e.g., *Detroit Department Use of Force Findings Letter*, DEP’T OF JUSTICE (Mar. 6, 2002), [http://www.justice.gov/crt/about/spl/documents/dpd/detroit\\_3\\_6.php](http://www.justice.gov/crt/about/spl/documents/dpd/detroit_3_6.php).

46. Rushin, *supra* note 34, at 1372.

47. *Id.* at 1377 (citing twenty-four settled negotiations in twenty-two jurisdictions since § 14141’s inception).

48. DARRELL L. ROSS, CIVIL LIABILITY IN CRIMINAL JUSTICE 186 (Elisabeth Roszmann Ebben ed., 6th ed. 2014).

49. *Id.*

Consent decrees are formal court-ordered and court-enforceable settlements, and usually provide for about five years of judicial oversight.<sup>50</sup> In contrast, MOAs are private contracts between the troubled municipality and the government.<sup>51</sup> While the municipality, alongside the police department, agrees in writing to abide by DOJ recommendations for reform and restructuring, there is no judicial oversight to check on departmental compliance with reform.<sup>52</sup> A consent decree is the better route for long-term enforcement of high-profile police agencies, whose activities have sparked nationwide skepticism regarding how police treat citizens. The decrees, effectively, allow the federal government, states, and localities to agree on proactive systems of preventing future misconduct and civil rights violations—all with a judge’s gavel looming large. Either way, both consent decrees and MOAs call for independent monitors, who report on the police department’s compliance within the respective agreement.<sup>53</sup>

After a consent decree or MOA is imposed, a special monitor is appointed to serve as an independent auditor of the police department. “The monitor typically involves a team of professional consultants with prior law enforcement management experience, involvement in pattern or practice litigation, or involvement in overseeing management reforms in other areas of business or professional life.”<sup>54</sup> The team submits quarterly public reports on the department’s compliance with DOJ reform. When the monitor reports that the department has successfully met the terms of the decree, or MOA, the team is terminated and the district court accepts the team’s judgment.<sup>55</sup>

The New Orleans consent decree is the most comprehensive agreement the DOJ has reached with a police department to date.<sup>56</sup> The 154-page court order is the product of § 14141 formal investigation of the New Orleans Police Department (“NOPD”), whose alleged post-Hurricane

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50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Samuel Walker & Morgan Macdonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 GEO. MASON U. CIV. RTS. L.J. 479, 511 (2009).

55. *Id.* at 511–12.

56. See Consent Decree Regarding the New Orleans Police Dept. at 2, *United States v. City of New Orleans*, 35 F. Supp. 3d 788 (2013) (No. 2:12-cv-01924-SM-JCW), [hereinafter *New Orleans Consent Decree*], [http://www.justice.gov/crt/about/spl/documents/nopd\\_consentdecree\\_7-24-12.pdf](http://www.justice.gov/crt/about/spl/documents/nopd_consentdecree_7-24-12.pdf). The formal investigation revealed a pattern or practice of excessive force, illegal stops, searches, and arrests, as well as racial, ethnic and transgender discrimination.

Katrina police violence stirred national attention.<sup>57</sup> The precedential factor was the level of transparency incorporated into the consent decree and monitor selection process.<sup>58</sup>

Under the consent decree, the NOPD was ordered to implement broad changes in policies and practices related to a laundry list of unconstitutional activities: use of force, illegal stops, searches and arrests, custodial interrogations, photographic line-ups, discriminatory policing, community engagement, recruitment, training, officer assistance and support, performance evaluations and promotions, supervision, misconduct investigations.<sup>59</sup> The decree focused heavily on a community-oriented policing approach and engagement with neighborhood organizations and groups. Most significantly, the consent decree mandated a complete overhaul of the NOPD's standards regarding use of force. Under the consent decree, the NOPD would now be required to regulate nearly every possible outlet for use of force, ranging from oleoresin capsicum spray and canines to firearms and tasers.<sup>60</sup>

Such an agreement requires close and interactive oversight by a court-appointed monitoring team. The New Orleans consent decree remains in effect until the city demonstrates compliance with its provisions, or until the monitor's assessment of the agreement's outcome demonstrates sustained and continuing improvement in constitutional policing. Monitoring and reform consistent with consent decrees can take as little as five years to over a decade, depending on the agreement and department. The DOJ does not expect complete, 100% compliance with the agreement, but rather "substantial compliance."<sup>61</sup> This threshold is met if the monitor, who goes through the terms paragraph-by-paragraph, determines a department has satisfied ninety-four percent of the agreement as a whole.<sup>62</sup>

A consent decree, especially one with detailed and specific police culture modifications like the one created for the NOPD, provides a

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57. *Justice Department Announces Consent Decree with City of New Orleans to Resolve Allegations of Unlawful Misconduct by New Orleans Police Department*, DEP'T OF JUSTICE: JUSTICE NEWS (Sept. 15, 2014), <http://www.justice.gov/opa/pr/justice-department-announces-consent-decree-city-new-orleans-resolve-allegations-unlawful>.

58. Rushin, *supra* note 34, at 1388.

59. See New Orleans Consent Decree, *supra* note 56, at 1.

60. *Id.* at 14–33.

61. Rushin, *supra* note 34, at 1394 n.279 (citing telephone interview with anonymous external monitor, who stated that his team used a ninety-four percent completion rate to measure compliance because "many of these elements require examination of documents [and t]o do that, we really need to do scientific sampling . . . so, what were looking at was this sort of plus or minus 5% error range around that level").

62. See *id.*

blueprint for constitutional policing. Under these federally designated metrics and often under the demanding, watchful eye of the monitor and a federal judge, consent decrees can lead to significant compliance. Furthermore, the recommendations for reform, outlined in these consent decrees and MOAs, remain largely consistent.<sup>63</sup> Ultimately, all settlements under § 14141 demand monitoring, reporting, and additional oversight by the DOJ.

## II. Issue Organizations and § 14141 Reform

Consent decrees are designed to force and incentivize change in even the most fiercely resistant police departments, or “issue organizations,” whether that resistance stems from the brass in charge of police management or the rank-and-file officers on dispatch patrols. In fact, the incentive to enter into a consent decree is so strong that the DOJ has only resorted to filing civil complaints in ten instances since Congress enacted § 14141.<sup>64</sup> Oftentimes even the initiation of litigation will result in settlement, because, as one former monitor and DOJ official said, “no city has wanted to risk litigation.”<sup>65</sup> While settlement appeases all those involved temporarily, it does not destroy the prevalence of issue organizations—police departments that either pushback against federal intervention or falter in sustaining reform following the monitoring period. While there is no formulaic definition of what encompasses an issue organization, these organizations are an interesting breed of law enforcement that epitomize resisting or relapsing departments. Drawing from stubborn or struggling departments under § 14141 investigations, this Part highlights persistent trends that appear in pushback or problematic organizations, focusing on two local law enforcement agencies in particular.

### A. Refusal and Resistance: Alamance County

Lawsuits under § 14141 are infrequent because claims for injunctive relief are more expensive and burdensome than settlement. One resisting issue organization, however, broke the courtroom barrier this year. The DOJ’s investigation into the Alamance County Sheriff’s Office (“ACSO”)

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63. *Id.* at 1378–87 (outlining the most prominent points of reform incorporated in settlement agreements: (1) use of force, (2) early intervention and risk management systems, (3) complaint procedures, (4) training overhaul, (5) bias-free policing, (6) community and problem-oriented policing).

64. *Special Litigation Section Cases and Matters*, DEP’T OF JUSTICE, <http://www.justice.gov/crt/about/spl/findsettle.php#police> (last visited Mar. 27, 2016).

65. Rushin, *supra* note 34, at 1375.

marks the first time a § 14141 investigation resulted in trial—and the DOJ lost.<sup>66</sup> After a two-year investigation into the ACSO, the DOJ released a formal findings letter,<sup>67</sup> detailing ACSO's discriminatory policing practices against Latinos and invited the ACSO to negotiate a court-enforceable agreement to remedy the violations.<sup>68</sup> Sheriff Terry Johnson refused to enter into settlement negotiations, claiming the DOJ's allegations were "meaningless" and that "no remedial measures are needed" within the agency.<sup>69</sup> His resistance was met with further force.

On December 20, 2012, upon exhausting all reasonable attempts to obtain ACSO compliance, the DOJ filed a civil rights lawsuit under § 14141 against the sheriff and his office.<sup>70</sup> The complaint alleged that "[t]he discriminatory conduct [] observed is deeply rooted in a culture that begins with Sheriff Johnson and permeates the entire agency."<sup>71</sup> Among other things, the DOJ alleged that Sheriff Johnson and his high-rank officers explicitly instructed deputies to target Latinos in traffic stops and fostered a culture of bias by using anti-Latino slurs.<sup>72</sup>

On August 7, 2015, a North Carolina federal judge dismissed the case against Sheriff Johnson and his office.<sup>73</sup> Focusing on the alleged statement that Sheriff Johnson asked his deputies to go "bring me some Mexicans," the court found this was unsupported and lacked appropriate context.<sup>74</sup> The court did, however, admonish "language, epithets and slurs used by some ACSO officers."<sup>75</sup> While some may find this to be the quintessential "slap on the wrist," it signifies a grander layer of § 14141 reform: the value of

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66. *Court Rules for Alamance County Sheriff Terry Johnson in DOJ Discrimination Case*, FOX 8 (Aug. 7, 2015, 3:15 PM), <http://myfox8.com/2015/08/07/court-rules-for-alamance-county-sheriff-terry-johnson-in-doj-discrimination-case/>.

67. See Letter from Dep't of Justice, Civil Rights Division to Clyde B. Albright, Alamance County Attorney (Sept. 18, 2012) (on file with author).

68. *Id.*

69. See Complaint at 5, *United States v. Terry Johnson*, 28 F. Supp. 3d 499 (M.D.N.C. 2007) (No.1:12-CV-01349) [hereinafter *Alamance County Complaint*].

70. *Id.*

71. *Id.*

72. *Id.*

73. Sarah Newell Williamson, *U.S. District Court Judge Dismisses Lawsuit Against Alamance County Sheriff*, GREENSBORO: NEWS & RECORD (Aug. 7, 2015, 1:39 PM), [http://www.greensboro.com/news/u-s-district-court-judge-dismisses-lawsuit-against-alamance-county/article\\_c06a1d4c-c214-5a9d-9fed-8776b28c00bd.html](http://www.greensboro.com/news/u-s-district-court-judge-dismisses-lawsuit-against-alamance-county/article_c06a1d4c-c214-5a9d-9fed-8776b28c00bd.html) (citing the court's opinion and quoting, "[a]fter careful consideration, the court concludes that the government has failed to demonstrate that the ACSO has engaged in a pattern or practice of unconstitutional law enforcement against Hispanics").

74. *Id.*

75. *Id.*

departmental challenge of DOJ allegations of unconstitutional policing. Federal police reform is a two-way street, and if police departments have valid reason and resources for pushback, this should be welcomed. The goal is to uncover valid constitutional violations and the series of events involving ACSO serves as a reality check for the DOJ that not all pushback is unwarranted.

Departments that resist or refuse federal intervention impede the structural reform process, for better or for worse. They also serve as examples of where federal power needs to be dialed back. Meanwhile, other issue organizations—prone to relapse—keep the DOJ alert as to where more federal power and post-monitoring attention is needed.

### **B. Relapse Post-Monitoring: Pittsburgh Bureau of Police**

The Pittsburgh Bureau of Police (“the Bureau”) presents another prototype issue organization. As the first agency in the nation to undergo federal intervention and a consent decree under § 14141 in 1997,<sup>76</sup> the Bureau’s significant experience provides insight into the capacity of lasting reform. It also sheds light on how long and why a department is motivated to comply with a consent decree after the federal monitor is no longer in the picture. Initially, researchers were optimistic that local Pittsburgh officials would be able to maintain reform once the DOJ withdrew oversight.<sup>77</sup> However, with a newfound political structure and resistance from front-line officers, reform policies in Pittsburgh are backsliding.<sup>78</sup>

Once monitoring ends so does DOJ involvement—a gold standard that may need reworking for troubled police departments like the Bureau. Indeed, Pittsburgh citizens expressed that once the federal monitor left, the sense of obligation to continue detailed, responsible reporting fled the Bureau as well.<sup>79</sup> In June 2005, federal monitors determined the Bureau substantially complied with the consent decree, terminating federal oversight.<sup>80</sup> Today, Pittsburgh residents question the long-term sustainability of reform, and claim that the Bureau “isn’t as open to outside

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76. Laura Maggi, *Pittsburgh Bureau of Police was the First in Nation with Official Federal Intervention*, NOLA.COM: THE PICAYUNE TIMES (Oct. 16, 2011, 7:29 AM), [http://www.nola.com/crime/index.ssf/2011/10/pittsburgh\\_bureau\\_of\\_police\\_wa.html](http://www.nola.com/crime/index.ssf/2011/10/pittsburgh_bureau_of_police_wa.html).

77. ROBERT C. DAVIS ET AL., TURNING NECESSITY INTO VIRTUE: PITTSBURGH’S EXPERIENCE WITH A FEDERAL CONSENT DECREE: VERA INSTITUTE OF JUSTICE 62 (2002).

78. See *infra* note 82.

79. See ROBERT C. DAVIS ET AL., CAN FEDERAL INTERVENTION BRING LASTING IMPROVEMENT IN LOCAL POLICING?: THE PITTSBURGH CONSENT DECREE: VERA INSTITUTE OF JUSTICE 37–39 (2005).

80. *Id.* at 41.

scrutiny as it was a few years ago.”<sup>81</sup> This sentiment stems from the city’s recent increase in police brutality incidents.<sup>82</sup>

The reemergence of a police-community rift in Pittsburgh can be attributed to the shift away from reform-minded local leadership. In 2006, Pittsburgh citizens elected a new mayor, Robert O’Connor, to replace Thomas Murphy, who supported reformed-minded Police Chief Robert McNeilly.<sup>83</sup> The new mayor immediately fired Police Chief McNeilly, explaining his administration was looking to take a “different direction.”<sup>84</sup> The action arguably reversed over a decade of work McNeilly conducted while vigorously enforcing the Pittsburgh consent decree.<sup>85</sup> Pittsburgh’s current mayor, Bill Peduto, recently acknowledged that the Bureau has experienced turmoil but is optimistic that a new command staff and “a rank and file that understands promotion is no longer based on politics but merit,” will revitalize reform.<sup>86</sup> The city’s newest Police Chief Cameron McLay also provides hope for revamping reform. “We’re looking to polish off what worked really well during the consent decree era,” he said in March 2015.<sup>87</sup> In doing so, Chief McLay will need internal recognition and buy-in from rank-and-file officers before any emergence of police-community trust can be reestablished.

The marked digression in Pittsburgh can also be attributed to a belief that many frontline officers share: “de-policing.”<sup>88</sup> The theory underlying

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81. Maggi, *supra* note 76.

82. See Rich Lord & Liz Navratil, *Jordan Miles Jury Reaches Split Verdict: Awards Damages but Finds Against Excessive Force Claim*, PITTSBURGH POST-GAZETTE (Mar. 31, 2014 12:35 PM), <http://www.post-gazette.com/local/city/2014/03/31/Jury-reaches-verdict-in-Jordan-Miles-civil-trial/stories/201403310142>. (discussing one particularly brutal incident, amongst several, that have reignited police-community tension in Pittsburgh); see also Robert Zullo, *Pittsburgh Police Create Standards Office to Increase Accountability*, PITTSBURGH POST-GAZETTE (Mar. 4, 2015, 12:00 AM), <http://www.post-gazette.com/local/city/2015/03/04/To-increase-accountability-Pittsburgh-police-create-standards-office/stories/201503040135>.

83. Dennis B. Roddy, *On His First Day as Mayor, O’Connor Greets Hundreds of Well-Wishers*, PITTSBURGH POST-GAZETTE (Jan. 4, 2006, 12:00 AM), <http://www.post-gazette.com/local/city/2006/01/04/on-his-first-day-as-mayor-o-connor-greets-hundreds-of-well-wishers/200601040123>.

84. Michael A. Fuoco, *The Mayoral Transition: Police Chief Out*, PITTSBURGH POST-GAZETTE (Dec. 29, 2005, 12:00 AM), <http://www.post-gazette.com/local/city/2005/12/29/The-mayoral-transition-Police-chief-out/stories/200512290284>.

85. Michael A. Fuoco, *Police Chief McNeilly’s Tenure Saw Wrenching Changes*, PITTSBURGH POST-GAZETTE (Jan. 9, 2006, 12:00 AM), <http://www.post-gazette.com/local/city/2006/01/09/Police-chief-McNeilly-s-tenure-saw-wrenching-changes/stories/200601090107>.

86. Zullo, *supra* note 82.

87. *Id.*

88. See generally Frank Rudy Cooper, *Understanding “Depolicing”: Symbiosis Theory and Critical Cultural Theory*, 71 UMKC L. REV. 355 (2002) (defining de-policing and its connection to cultural and identity theories).



this behavioral concept is that federal intervention decreases police efficiency and aggressiveness, which in turn increases crime.<sup>89</sup> One Pittsburgh police officer said, "I think the decree limited officers' ability to perform their jobs. And criminals know this and take advantage."<sup>90</sup> Officers in Pittsburgh believe, and perhaps rightfully so, that the consent decree has jeopardized their legitimacy.

In 2005, the Vera Institute of Justice conducted a study regarding the effectiveness of Pittsburgh's consent decree.<sup>91</sup> The researchers found that one year after most of the consent decree had been lifted, reform remained firmly in place, but noted there was discontent among frontline officers.<sup>92</sup> Many officers surveyed following the consent decree revealed that they experienced "low morale" and felt excluded from the reform process.<sup>93</sup> Officers also mentioned fear to engage in certain behavior for lack of understanding negative employment consequences. These results exemplify the need to include and discuss all of the terms of a city's consent decree with rank-and-file officers prior to implementation. Change not only requires officer buy-in, but also that every officer possesses some minimal understanding of the consent decree's meaning, short and long-term effects, and need for unified support for reform.

As the first consent decree, Pittsburgh's agreement laid the groundwork for future negotiated settlements under § 14141. Yet, the city's current situation proves that boilerplate consent decrees and monitoring cannot be the "case closed" moment in structural police reform.

### III. Sustaining Federal Reform with Follow-Up and Auditing Procedures

One significant limitation on federal intervention under § 14141 is sustainability of police reform following monitoring.<sup>94</sup> Even the DOJ admits it has "not studied the long-term outcomes at the law enforcement agencies it has targeted."<sup>95</sup> The truth is some previously investigated police departments need revisiting, whether due to insufficient training consistent with settlements or a shift away from reform-minded leadership. This Part proposes two solutions for institutionalizing reform after the monitor

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89. *Id.*

90. Policing on Trial: Community, Race, Protest, and Reform (Mar. 19, 2015), UC Hastings (where Stephen Rushin presented his recent analysis of § 14141 reform).

91. See DAVIS ET AL., *supra* note 79.

92. *Id.*

93. *Id.* at 17.

94. Rushin, *supra* note 34, at 1408.

95. Kelly et al., *supra* note 44.

leaves: (1) follow-up procedures, and (2) internal, rather than solely external, monitoring.

The monitoring team exits the reforming department once substantial compliance is met. However, this benchmark is not a guarantee that departments will sustain the terms of a consent decree forever. The contract, whether court-enforceable or not, is a blueprint for reform—not a template that once terminated is self-sustaining. The DOJ's legal approach is centered on a timeframe of settlement completion. The goal is to reach a level of reform that will suffice to terminate external oversight. The problem with this approach is that sustainability of reform requires upkeep. Discussing the results of his qualitative research, Rushin mentioned that the one prominent request DOJ officials had when asked how § 14141 reform could be improved was the institution of follow-up teams.<sup>96</sup> These teams would return to departments that underwent federal intervention to ensure reform is maintained by local leaders and front-line officers. Branching off this follow-up request, this Note advocates for a supplemental backup plan, or follow-up process, in § 14141 interventions involving departments that resemble issue organizations. Under this plan, departments that show signs of refusal or relapse should be required to either incorporate a follow-up procedure as part of the consent decree or employ a permanent internal monitor as inside counsel once the consent decree is lifted.

#### A. Follow-up Clauses in a Consent Decree or MOA

Implementation of reform moves at a varying pace from department to department, from five years in Cincinnati to twelve in Los Angeles.<sup>97</sup> This is due in large part to organizational pathology, which trickles down from leaders' resistance or lack of resources to change.<sup>98</sup> By identifying issue organizations, the DOJ can require—by court-enforceable or contractual agreements—that those organizations take additional follow-up precautions. The DOJ often sets aggressive long-term deadlines, by which agencies are required to meet substantial compliance.<sup>99</sup> These deadlines reflect the DOJ's opinion of the depth of organizational dysfunction and capacity to implement mandated reforms.<sup>100</sup> The focus, at least with issue organizations, should be not only timelines for ultimate termination of

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96. Telephone interview with Stephen Rushin, Law Professor, University of Alabama (Feb. 2, 2015).

97. Rushin, *supra* note 34, at 1392.

98. Joshua Chanin, *On the Implementation of Pattern or Practice Police Reform*, 15 CRIMINOLOGY CRIM. JUST. L & SOC'Y 38, 45 (2014).

99. *Id.*

100. *Id.*

monitored reform, but also plans for revisiting departments that exhibit high organizational dysfunction.

This Note proposes that depending on the size, scope, and level of organizational dysfunction, a department that is projected to undergo about ten years of reform efforts should be required to implement a follow-up process. Such an adjustment would involve incorporating a single clause, or section, into the consent decree that leaves room for federal oversight to reappear in a department that is unable to maintain reforms absent an external monitor following substantial compliance. The follow-up process would only be required of issue organizations that experience trigger events demonstrating that sustainability of reform will be more difficult than expected. Trigger events could include an incessant streak of excessive force incidents, severe decrease in data reporting and complaint resolutions, or drastic shifts in department leadership. If any of these appear within the reforming issue organization, the follow-up procedure should be instituted to recalibrate and incentivize the police department to sustain reform on their own.

Pittsburgh, first and foremost, would have benefited from a follow-up clause in its consent decree with the DOJ.<sup>101</sup> The legal literature and media reports demonstrate that the Bureau experienced a few events indicating that additional federal monitoring was needed. Given the absence of timely and independent investigations into officer misconduct, extreme uses of excessive force, and shuffling of police chiefs, the Bureau exemplifies need for reform follow-up.<sup>102</sup> Monitored reform in Pittsburgh took about 8.2 years,<sup>103</sup> potentially because it was the first federal intervention of a local police department or because it would be considered an issue organization by today's standards. As Pittsburgh anticipates yet another consent decree, this crisis could have been averted with an overly cautious consent decree.

Incorporating a follow-up procedure, baked into the consent decree, is a simple, added precaution for the DOJ. Still, police departments may not be receptive to follow-up teams. Detective Sergeant Brendan Kolding of the Seattle Police Department said, "The door shouldn't be left open. The local agency should be trusted to do its job once these matters are

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101. Mid-reform, one Pittsburgh leader "suggested that 'the consent decree involve five years of monitoring with another ten-year probationary period during which the Police Bureau would be required to submit written reports to the Department of Justice.'" DAVIS ET AL., *supra* note 77, at 47. While a step in the right direction, this Note proposes a probationary period for only issue organizations, for which ten-plus years of reform is insufficient.

102. See discussion *supra* Part II.B (discussing Pittsburgh's status as an issue organization in need of backup reform).

103. See Rushin, *supra* note 34, at 1392 fig. 5.

settled.”<sup>104</sup> A valid and strong criticism of federal follow-up is its potential for unlimited encroachment on state and local police power. Reforming departments, however, are already undergoing top-down investigations and complete restructuring. An additional warning that federal intervention *may* return could incentivize sustainability in issue organizations post-intervention. Required follow-up procedures would increase police accountability by reminding local departments that federal oversight could return if substantial compliance is not maintained following federal withdrawal.

### **B. Internal Monitor or Auditor for High-Stakes Issue Organizations**

Continued oversight, or constant DOJ presence, is less common but another valuable element of enforcing mandated reform post-intervention. Departments that have internal structural deficiencies should be required to incorporate internal auditing systems. The DOJ’s goal should be to equip issue organizations with in-house reform specialists—individuals who make a living out of management and conflict resolution and also understand potential legal ramifications. By recruiting retired, reform-minded police leaders, experts, and attorneys, all of whom have worked with the police, to serve as “auditors” or internal monitors, the DOJ can improve the reform process and appease recalcitrant, front-line officers.

Selection of an external monitor is the most controversial point in settlement negotiations.<sup>105</sup> The main point of contention rests on the monitor’s level of law enforcement background. While police departments push for monitors with law enforcement experience, the DOJ stresses a need for lawyers. Indeed, front-line officer buy-in is more likely if officers know their reform leader “has worn their shoes for a while.”<sup>106</sup> Then again, every top-down intervention of a local police department involves complicated matters of constitutional law and criminal procedure, for which monitors with general legal background are useful, especially when it comes to interfacing with the court and explaining legal implications of reform.<sup>107</sup> Even so, police officials and local community stakeholders have

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104. Telephone interview with Brendan Kolding, Detective Sergeant, Seattle Police Department (“SPD”) (Feb. 19, 2016). Kolding works in the Policy Unit of the SPD, where he has been implementing § 14141 reform and writing new police policies pursuant to the consent decree. The SPD does not classify as an issue organization. The department’s reform efforts have been recognized and praised all the way to the White House. Amy Clancy, *Seattle Police Department’s Reform Efforts to Be Recognized by White House*, KIRO7 (July 21, 2015, 5:38 PM), <http://www.kiro7.com/news/seattle-police-departments-reform-efforts-be-recog/28733573>.

105. Rushin, *supra* note 34, at 1388.

106. *Id.* at 1390.

107. *Id.*

commented that the reform process is too adversarial.<sup>108</sup> The complaints center on claims that: lawyers are talking with other lawyers, the agreements are too complex and lengthy, negotiations are time-consuming, case monitors can become problematic, and police unions can serve to undermine agreed-upon changes.<sup>109</sup>

The solution is a neutral peacekeeper and auditor, who has both legal and law enforcement experience and can take on a stable role inside the department. For instance, a unique auditing system proved beneficial in reforming the Los Angeles Police Department ("LAPD") long-term.<sup>110</sup> LAPD's consent decree required the creation of an Audit Division that sent undercover informants to LAPD stations to monitor progress, specifically in terms of reform of the department's complaint system.<sup>111</sup> To this day, the Audit Division is responsible for tracking the implementation of recommendations the department adopts and allows the department to scrutinize and test its own internal controls over police activity.<sup>112</sup> No other police organization maintains as thorough and professional an internal audit procedure.<sup>113</sup>

An extended and permanent monitoring or auditing process that imitates LAPD's Audit Division would simultaneously bolster accountability and appease law enforcement agencies with deeper-rooted organizational dysfunction. During standard § 14141 reforms, the *external* monitor regularly visits the police agency to audit departmental records and meet with officers. Department visits and audits result in quarterly public reports that evaluate the agency's progress in implementing the terms of the settlement. An extended and *internal* approach would amplify these duties

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108. TAKING STOCK: REPORT FROM THE 2010 ROUNDTABLE ON THE STATE AND LOCAL LAW ENFORCEMENT POLICE PATTERN OR PRACTICE PROGRAM 4 (42 USC § 14141) (2011).

109. *Id.*

110. CHRISTOPHER STONE ET AL., PROGRAM IN CRIMINAL JUSTICE POLICY AND MANAGEMENT HARVARD KENNEDY SCHOOL, POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD 42 (2009).

111. *United States v. City of Los Angeles*, 2:00-cv-11769-GAF-RC, at 23-27 (C.D. Cal. June 15, 2001) [hereinafter *Los Angeles Consent Decree*], <http://www.clclearinghouse.net/chDocs/public/PN-CA-0002-0006.pdf>.

112. STONE ET AL., *supra* note 110, at 39 (evaluating LAPD's Audit Division and comparing the management process to the "same way [a] large corporation conducts audits of its internal financial controls").

113. *Id.* at 42. The internal auditing process remains a national leader and is credited for LAPD's "remarkable and statistically significant improvement in its adherence to complaint procedures." Rushin, *supra* note 34, at 1403 (stating that the LAPD's novel auditing system helped the department achieve nearly perfect compliance with complaint procedures under the consent decree, correcting a problem that plagued the department for years).

and add a familiar face to the reform process in resistant or relapsing organizations.

However, there is a concern that the employment of a permanent monitor in police departments in need of additional federal oversight would eventually lead to agency capture. Agency capture is a form of political corruption whereby government agencies or entities established to regulate a certain body, end up influenced and controlled by the very agencies they were supposed to regulate.<sup>114</sup> In the context of police department reform, agency capture would surface after a permanent monitor—brought in by the federal government to regulate police misconduct—becomes so embedded in the agency that he makes concessions or overlooks misconduct. The fear is that the police department's brass and officers will unduly influence the monitor, resulting in decisions that unfairly favor the private interests of the regulated organization. Given that the organizations likely to be assigned a permanent, internal monitor are issue organizations that initially refused federal oversight, they may have even more incentive to "capture" the internal monitor and rid themselves of federal oversight. While the solution for possible agency capture may be as simple as executing rotations of internal monitors, such an approach might also defeat the very purpose of the extended monitoring process—instituting a familiar, neutral face inside the department.

Regardless, weighing the potential for agency captures against the increased chances of sustainability in the issue organizations, an in-house monitor is a greater benefit than detriment. Additionally, these internal checks would only occur in identified issue organizations undergoing reform, not *every* department facing § 14141 intervention. This is because high-stakes, issue organizations are more likely to fall prey to lengthy, expensive litigation—or worse—relapse to pre-settlement police misconduct. Optimizing reform with follow-up procedures or permanent auditing will provide steps toward sustainable reform and serve as backup where trouble is projected.

#### **IV. Applying § 14141 Reform Within the Ferguson Police Department**

On September 4, 2014, then Attorney General Eric Holder launched a § 14141 inquiry into the Ferguson Police Department ("FPD").<sup>115</sup> This

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114. See, e.g., *Wood v. General Motors Corp.*, 865 F.2d 395, 418 (1st Cir. 1988) (defining agency capture).

115. Delvin Barrett, *Justice Department to Open Broad Inquiry Into Ferguson Police*, WALL ST. J. (Sept. 4, 2014, 4:09 AM), <http://www.wsj.com/articles/justice-department-to-open-broad-inquiry-into-ferguson-police-1409791620>.

investigation revealed a pattern or practice of unlawful conduct within the FPD and the municipal court system that violated the First, Fourth and Fourteenth Amendments.<sup>116</sup> This Part outlines the significant results of the § 14141 investigation in Ferguson and provides a prognosis for how reform will unravel in the smallest department to undergo pattern-or-practice reform. Aiming to profile the FPD, this Part also highlights factors that may or may not facilitate sustainable reform in Ferguson. Most importantly, this Part tailors the suggested backup plans—follow-up procedures and internal monitors—to the FPD, should § 14141 reform not yield results within ten years.

#### A. Results from the Formal Pattern-or-Practice Investigation in Ferguson

On March 5, 2015, the DOJ released a report summary (“the Report”) on its findings in Ferguson following its pattern-or-practice investigation.<sup>117</sup> The Report detailed (1) that Ferguson’s law enforcement practices focus on revenue generation rather than public safety, and (2) that racial bias infiltrated the city’s law enforcement and municipal court system.<sup>118</sup>

In terms of revenue generation, the DOJ uncovered that the city “budgets for sizable increases in municipal fines and fees each year, exhorts police and court staff to deliver those revenue increases, and closely monitors whether those increases are achieved.”<sup>119</sup> Officer promotions depend on “productivity,” in essence, the number of citations issued.<sup>120</sup> As a result of the city and FPD’s prioritization of revenue generation, many officers see residents—especially those living in Ferguson’s predominantly African-American neighborhoods—not as citizens in need of protection, but as sources of revenue. The data shows that the city’s emphasis on revenue has a significant effect on policing. In addition, the FPD appears to bring certain minor offenses almost exclusively against African-Americans. From 2011 to 2013, African-

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116. FERGUSON REPORT, *supra* note 2.

117. Matt Apuzzo, *Ferguson Police Routinely Violate Rights of Blacks*, *Justice Dept. Finds*, N.Y. TIMES (Mar. 3, 2015), <http://www.nytimes.com/2015/03/04/us/justice-department-finds-pattern-of-police-bias-and-excessive-force-in-ferguson.html>.

118. FERGUSON REPORT, *supra* note 2, at 3 (uncovering that in 2013 Ferguson’s municipal court issues over 9,000 arrest warrants on cases stemming in large part from minor infractions such as traffic tickets and housing code violations). Of the \$11.7 million Ferguson collected in 2010 in general fund revenue, \$1.38 million originated from fines and fees collected by the court. *Id.* at 9.

119. *Id.* at 2.

120. *Id.*

Americans made up ninety-five percent of “Manner of Walking in Roadway” charges (i.e., jaywalking tickets) and ninety-four percent of “Failure to Comply” charges (i.e., disobeying a lawful order or refusing to identify oneself).<sup>121</sup>

The Report indicates a pervasive problem relevant to revenue generation and racial bias—the decision to arrest.<sup>122</sup> FPD officers routinely abuse the “Failure to Comply” charge; arresting individuals who refuse to follow officers’ orders, even where a request is unreasonable or unconstitutional.<sup>123</sup> Refusal, however, is not a crime, and the First Amendment protects talking back to a police officer.<sup>124</sup> FPD officers also consistently issue multiple citations during one stop; during at least one instance an officer issued fourteen citations.<sup>125</sup> In fact, during formal investigation officers told the DOJ that some compete to see who can issue the most citations in a single encounter.<sup>126</sup> Each month a list is posted inside the FPD police station, detailing the number of tickets each officer issues—a tactic to incentivize more ticketing.<sup>127</sup>

Despite these unflattering statistics, we need police discretion. Without it, our communities become ridden with crime. However, it is evident that some departments need better training regarding the proper use of that valued discretion. The Report demonstrates FPD officers used minor violations to take advantage and disproportionately target lower income citizens.<sup>128</sup> Citing data collected from 2012-2014, the DOJ reported that—despite making up sixty-seven percent of the Ferguson population—African-Americans accounted for eighty-five percent of traffic stops, ninety percent of citations, ninety-three percent of arrests, and nearly ninety percent of use-of-force incidents.<sup>129</sup>

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121. *Id.* at 4.

122. *Id.* at 81.

123. *Id.* at 19–20 (stating that Ferguson’s stop-and-identify subsection of the “failure to comply charge” is unconstitutionally vague). Ferguson’s stop-and-identify law also stands in tension with the Supreme Court’s decision in *Florida v. Royer*, 460 U.S. 491, 407–98 (1983), in which the Court reasoned that a person approached by the police “need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.”

124. *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (“[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.”); *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) (“[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.”).

125. FERGUSON REPORT, *supra* note 2, at 11.

126. *Id.*

127. *Id.*

128. *Id.* at 19.

129. *Id.* at 4.



Potentially the most discussed DOJ findings were the various derogatory emails exchanged between police department supervisors and courthouse officials. The DOJ cited these emails as direct evidence of racial bias by influential Ferguson decision makers.<sup>130</sup> One email stated: "An African-American woman in New Orleans was admitted into the hospital for a pregnancy termination. Two weeks later she received a check for \$5000. She phoned the hospital to ask whom it was from. The hospital said, "Crimestoppers.""<sup>131</sup> Another email described a man seeking to obtain "welfare" for his dogs because they are "mixed in color, unemployed, lazy, can't speak English and have no frigging clue who their Daddies are."<sup>132</sup> The pattern-or-practice investigation determined that no officer or court clerk engaging in these communications was ever disciplined. The emails, instead, were forwarded along to others.<sup>133</sup>

The extensive Report concluded with a list of twenty-six "broadly identified changes necessary for meaningful and sustainable reform" in both the FPD and Ferguson municipal court system.<sup>134</sup> The DOJ sought institutional changes, such as documenting stops, searches, ticketing, and arrests to ensure the focus is no longer revenue but community protection. Other suggested reforms include: mandated training, instituting policies for dealing with vulnerable people, and reducing bias and its impact of police behavior and discretion.<sup>135</sup> Based on the findings, the road to "meaningful and sustainable reform" in Ferguson will be windy, bumpy, and far from contained within the four corners of the Report and recommendations.

## **B. Predictions, Peaks, and Pitfalls in Ferguson's Structural Reform Process**

So far, the § 14141 reform in Ferguson has taken on a fairly predictable progression, as its status as an issue organization rears its resisting head. Since the Report was released, city and police leaders have stepped down and media reports continue to publicly shame city officials and FPD officers as the city prepares itself for what could be a decade-long intervention.<sup>136</sup> As of this writing, the City of Ferguson and the DOJ

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130. *Id.* at 71.

131. *Id.* at 72.

132. *Id.*

133. *Id.*

134. *Id.* at 6.

135. *Id.* at 94.

136. *See infra* note 169 and accompanying text.

released a 127-page draft consent decree (“the Decree”).<sup>137</sup> The Decree focuses on “reorient[ing] Ferguson’s use-of-force policies toward de-escalation and avoiding force,” and requires the implementation of community boards to enhance relationships between FPD officers and community members.<sup>138</sup> As with most consent decrees, the agreement requires the appointment and selection of an independent monitor and the use of body-worn and in-car cameras.<sup>139</sup>

On February 9, 2016, the Ferguson City Council approved the Decree, but under the condition that the DOJ adopt seven revisions or amendments—including to cap monitoring fees at \$1 million over the first five years and no more than \$250,000 in a single year of reform.<sup>140</sup> Understandably, the city’s chief concern is that the proposed reform could financially break the city, which has a budget of about \$14 million and is \$2.8 million in debt.<sup>141</sup> The proposed amendments follow estimations made by Ferguson Mayor James Knowles III and other city officials that the DOJ’s requests could potentially cost the city \$10 million over the next three years.<sup>142</sup> As many predicted, the DOJ was not open to renegotiating. Instead, U.S. Attorney General Loretta Lynch announced, one day after the city council meeting, that the DOJ filed a civil rights lawsuit against Ferguson.<sup>143</sup> “The City of Ferguson had a real opportunity here to step forward, and instead they’ve turned backwards,” she said. “They’ve chosen to live in the past.”<sup>144</sup>

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137. Eyder Peralta, *Ferguson, Justice Unveil Draft of Negotiated Consent Decree*, NPR (Jan. 27, 2016, 5:34 PM), <http://www.npr.org/sections/thetwo-way/2016/01/27/464610005/ferguson-justice-unveil-draft-of-negotiated-consent-decree>. For the full draft of the most recent Decree, see *United States v. City of Ferguson*, 4:16-cv-000180-CDP (E.D. Mo. Mar. 17, 2016) [hereinafter *Ferguson Draft Consent Decree*], <https://www.justice.gov/crt/file/833701/download>.

138. *Ferguson Draft Consent Decree*, *supra* note 137.

139. *Id.* at 52, 103.

140. *Ferguson’s Proposed Amendments to the DOJ Consent Decree*, CHICAGO TRIBUNE (Feb. 10, 2016, 9:54 AM), <http://www.chicagotribune.com/ct-ferguson-justice-department-plan-20160210-story.html>.

141. Amer Madhani & Kevin Johnson, *Justice Department Threatens Legal Action Against Ferguson*, USA TODAY (Feb. 10, 2016, 12:48 PM), <http://www.usatoday.com/story/news/2016/02/09/fergson-doj-consent-decree/80084794/>.

142. *Id.*

143. Matt Apuzzo, *Department of Justice Sues Ferguson, Which Reversed Course on Agreement*, N.Y. TIMES (Feb. 10, 2016), <http://www.nytimes.com/2016/02/11/us/politics/justice-department-sues-ferguson-over-police-deal.html>.

144. *Id.* Ferguson finally accepted the DOJ’s consent decree on March 15, 2016, after initially refusing to do so. Laura Wagner, *Ferguson City Council Accepts Consent Decree Worked Out with Justice Department*, NPR (Mar. 15, 2016, 9:13 PM), <http://www.npr.org/sections/thetwo-way/2016/03/15/470598733/ferguson-city-council-accepts-deal-with-justice-department>.

Despite Ferguson's hesitations, the structural reform process has worked well in several cities.<sup>145</sup> But the prognosis for sustainable reform in Ferguson remains open for discussion as Ferguson responds to the lawsuit, the Decree is finalized, and the reform is instituted. This Subpart is designed to present the peaks and pitfalls the pattern-or-practice reform may present in Ferguson. With several advancements, from technology to nationwide recognition of the Ferguson's unconstitutional policing, the dispute in Ferguson may be groundbreaking. This § 14141 reform is the most closely watched since the DOJ began such investigations in 1997, and it will likely set the tone for more sustainable reform in other high-stakes police departments.

*1. Reassessing and Revising the Meaning of Police Discretion*

The Report generally found that FPD officers relied heavily on minor infractions to cite, arrest, and raise city revenue. Given the misuse of minor violations and the instinctiveness to arrest lower income citizens, the FPD lacks a proper understanding of when to wield appropriate discretion. If not recalibrated, the inability to properly use discretion could affect reform efforts in Ferguson. The answer, for now, is more supervision over FPD officers, notifying them that records of who and why they choose to arrest will be subjected to heightened scrutiny.

Arrests made for "Failure to Comply" with law enforcement present the harshest example of FPD officers exploiting discretion in an unconstitutional and racist manner.<sup>146</sup> Several cases depicted individuals who were arrested for refusing to identify themselves, even though it was within their rights to do so.<sup>147</sup> And, one man was arrested after he refused to provide his social security number to a police officer who approached him for no apparent reason.<sup>148</sup>

Before reform in Ferguson can take flight, the entire command staff needs a reiteration of what constitutes a valid legal violation, warranting a valid arrest. It is well established that front-line officers have significant

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145. The SPD, which has already reached initial consent decree compliance, is projected to terminate reform by 2018, amounting to about six years of federal reform. Telephone interview with Brendan Kolding, Detective Sergeant, SPD (Feb. 19, 2016). However, as Kolding noted, cities like Ferguson and New Orleans do not have the same resources as Seattle, and the level of severity in offenses is not comparable.

146. FERGUSON REPORT, *supra* note 2, at 25. In one case, an officer arrested two female high school students because he saw them fighting after he told one to stay home and the other not to seek her out.

147. *Id.* at 20–21. The Decree, as of now, as an entire section dedicated to reiterating First Amendment protected activity. See Ferguson Draft Consent Decree, *supra* note 137, at 26–30.

148. FERGUSON REPORT, *supra* note 2, at 20–21.

discretionary authority.<sup>149</sup> These officers, with the guidance of their supervisors, maintain the ultimate control over how new departmental policies and procedures will be accomplished in the field.<sup>150</sup> An officer's overbearing and unconstitutional use of discretion often leads to racial disparities, exhibited by the high percentage of African-American arrests for petty, vague offenses. Ferguson should take note of the organizational deficiencies in issue organizations like Alamance County<sup>151</sup> and confront its conscious and subconscious tendencies to stop, cite, or arrest lower income African-American residents. Indeed, the Report cited that Ferguson officers are fifty percent more likely to stop, and subsequently arrest, when using their own judgment—a statistic significantly worse than when officers use a radar gun to catch speeding drivers.<sup>152</sup>

Countywide, Ferguson is not alone in its pattern of misuse of discretion. The DOJ found that the entire St. Louis region operates on a “wanted” notices system.<sup>153</sup> The system essentially involves issuances of “wanted” notices from one officer or department to another that ask whoever encounters the “wanted” individual first to arrest him.<sup>154</sup> Wanted notices neglect a big constitutional problem—officers usually need a warrant before they can just arrest someone.<sup>155</sup> And, as the DOJ report finds, these “wanted” notices are often “used as an end-run around the judicial system.”<sup>156</sup>

In the Decree, the DOJ called for repeal or revise to the Ferguson Municipal Code, specifically for the Failure to Comply offense and the vague jaywalking offense.<sup>157</sup> It also requested elimination of “wanted” notices, beginning with a one-year moratorium.<sup>158</sup> In terms of supervision,

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149. Chanin, *supra* note 98, at 40.

150. *Id.*

151. See *supra* Part II.A. Abuse of police discretion was exhibited in Alamance County, where Sheriff Johnson allegedly encouraged deputies to ticket and arrest only Mexicans for minor infractions. Despite DOJ findings, Sheriff Johnson continues to deny allegations of racism within his office and has made no changes in supervising his staff.

152. Nora Kelly & Brian Resnick, *In Ferguson, Racial Bias Makes Police Officers Worse Than Machines*, NAT'L J. (Mar. 4, 2015), <http://www.nationaljournal.com/domesticpolicy/in-ferguson-speed-detectors-arc-less-racially-biased-than-police-officers-20150304>.

153. FERGUSON REPORT, *supra* note 2, at 22.

154. *Id.*

155. See *United States v. Watson*, 423 U.S. 411, 417–24 (1976); *Aguilar v. Texas*, 378 U.S. 108, 111 (1964); *Wong Sun v. United States*, 371 U.S. 471, 479–80 (1963).

156. FERGUSON REPORT, *supra* note 2, at 22.

157. Ferguson Draft Consent Decree, *supra* note 137, at 9–10.

158. *Id.* at 23–24. “During this moratorium, the City will continue to use ‘bc on the lookout’ or ‘allpoints’ bulletins, and warrants, consistent with generally accepted police practice nationwide, and evaluate alternatives to the use of ‘stop orders’ or ‘wanted.’” *Id.* at 24.

the Decree asked the FPD to develop an extensive protocol for reviewing arrests, issued citations, and warrants.<sup>159</sup> Each of these requested reforms will aid the FPD in reassessing the meaning of discretion.

2. *Implementing Body Cameras: Legal Body Armor or Shaky Instant Replay?*

Following the Michael Brown shooting in Ferguson and the Eric Garner deadly chokehold in Staten Island weeks later, the power of video cameras resurfaced. As one of the measures taken in response to these fatal police-citizen interactions, President Obama announced that the federal government would spend upwards of \$75 million on body cameras for law enforcement officers nationwide.<sup>160</sup>

Police leaders who have deployed body cameras welcome the initiative, citing the many benefits associated with the devices. Body cameras are useful for documenting evidence, officer training, reducing and resolving complaints, and strengthening police accountability. In addition, now that police protect and serve in a world where anyone with a cell phone camera can record a police encounter, body cameras serve as legal body armor.<sup>161</sup> They help police departments ensure events are also captured from an officer's point of view.<sup>162</sup>

As political leaders and most community members promote the institution of body cameras for police officers nationwide, there is no shortage of skeptics. John Burris, a prominent Civil Rights attorney,<sup>163</sup> vocalized support for the use of lapel cameras in police departments but nevertheless questions the real value they will provide. While the cameras are a step in the right direction, "much of what happens in this country in terms of police brutality doesn't happen on camera," Burris said.<sup>164</sup> The

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159. *Id.* at 24–26. This includes field supervisors reviewing each arrest report and memorializing their review in writing "by the end of the shift within which the arrest occurs." *Id.* at 24. Supervisors will also review each request for a search or arrest warrant. They must assess warrant applications and arrest reports for: "accuracy and authenticity; 'canned,' boilerplate, or conclusory language, inconsistent information; inadequate articulation of legal basis for the police action taken." *Id.* at 25.

160. Trymaine Lee, Zachary Roth & Jane C. Timm, *Obama to Announce \$75 Million for Body Cameras*, MSNBC (Dec. 1, 2014, 8:13 PM), <http://www.msnbc.com/msnbc/obama-announce-75-million-body-cameras>.

161. DOJ: COMMUNITY ORIENTED POLICING SERVICES ("COPS"), IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED (2014).

162. *Id.* at 1.

163. Policing on Trial: Community, Race, Protest, and Reform (Mar. 19, 2015), UC Hastings (speaking at the conference regarding civil rights and his work on the Oscar Grant case in Oakland).

164. *Id.*

function of the angle, the time of day, and the potentially shaky playback that may result from a filmed altercation all test the effectiveness of body cameras. Think of the number of sports replays, captured from several camera angles and with slow motion, that are still controversial. Sometimes, even a frame-by-frame playback leaves an interaction disputed. Still, body cameras allow for some modicum of insight into the actual officer-citizen interaction.

The Police Foundation recently completed a yearlong study on the effectiveness of body cameras.<sup>165</sup> “The findings suggest more than a 50% reduction in the total number of incidents of use-of-force compared to control-conditions, and nearly ten times [reduction in] citizens’ complaints.”<sup>166</sup> Despite the impressive numbers and benefits of body camera implementation, each police department is different.<sup>167</sup>

The current Decree seeks that the FPD equip officers with body-worn and in-car cameras to “promote transparency, provide learning opportunities for officers, and increase officer safety.”<sup>168</sup> Ultimately, body cameras should provide more pluses than minuses and facilitate sustainable reform in Ferguson. At least on the surface, the devices will hold FPD officers accountable and serve as legal body armor when officers are unjustly accused of unconstitutional practices in the field. Body cameras may not be a perfect third eye, but they are still *another* eye—objective and more reliable than most eyewitness accounts of police-citizen interactions.

### 3. *Making Room for Reform-Minded Leadership*

Changes in leadership that coincide with federal intervention open the door for a reform-minded prerogative to step in. One of the most positive indications in Ferguson is the almost instantaneous change in leadership that occurred after the Report was released. Three city officials resigned within a week.<sup>169</sup> Now, whoever takes over as permanent FPD police chief “will need to have the same leadership traits valued in boardrooms across

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165. See generally Tony Farrar & Barak Ariel, *Self-Awareness to Being Watched and Socially-Desirable Behavior: A Field Experiment on the Effect of Body-Worn Cameras on Police Use-of-Force*, THE POLICE FOUNDATION (2013) (finding that police body cameras were associated with dramatic reductions in use-of-force and complaints against officers).

166. *Id.* at 9.

167. The SPD, for example, has not implemented body-worn cameras because it is waiting on revisions to public disclosure state laws. Telephone interview with Brendan Kolding, Detective Sergeant, SPD (Feb. 19, 2016).

168. Ferguson Draft Consent Decree, *supra* note 137, at 52–53.

169. City Manager John Shaw, Municipal Judge Ronald Brockmeyer, and Police Chief Thomas Jackson all resigned. Ben Kesling, *Ferguson Police Chief Thomas Jackson Resigns*, WALL ST. J. (Mar. 11, 2015, 7:27 PM), <http://www.wsj.com/articles/ferguson-police-chief-thomas-jackson-resigns-1426106502>.

the world—the ability to form partnerships across organizational lines, to think differently, to turn failure into success and to do it all in a harsh media spotlight.”<sup>170</sup>

Indeed, Joshua Chanin’s prominent study on the implementation of pattern-or-practice reform theorizes that leaders “who are vocally committed to the implementation process and skilled in developing and communicating organizational agendas and priorities are particularly valuable.”<sup>171</sup> Successful reform initiatives are projected from the police chief down, but sometimes even the most reform-minded, persuasive police chief cannot convince a command staff that federal intervention will help, not hinder, officer morale. As Ferguson awaits appointment of its next permanent police chief, the process could stall initial changes already being executed within the FPD, including requiring supervisory approval for issuing more than one citation during a single incident and demanding officers participate in bias-free training.<sup>172</sup>

But a longer wait might be better than endless appointments, removals, and resignations of various police chiefs over the span § 14141 reform. For example, ongoing reform in Detroit remains stop-and-go mostly due to the city’s inconsistent leadership.<sup>173</sup> Since its consent decree was signed in 2003, Detroit has seen seven police chiefs, many of whom were sidelined by personal and professional indecency.<sup>174</sup> While taking an extended period of time to select a new, reform-minded police chief will likely cause unrest and diminished morale in the FPD, interim instability is better than premature selection of the most important leader in the reform process.

The unconstitutional pattern or practice in Ferguson infiltrated more than street-level policing; it tainted the entire investigative and adjudicatory processes of a small town looking to dig its way out of debt at the expense of its poorest residents. For this reason, there are two issues the police chief in Ferguson will face: (1) a lack of trust on the community’s part; and

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170. Michael Pearson, *The Tough Task Ahead for Ferguson’s Next Police Chief*, CNN (Mar. 13, 2015, 8:22 PM), <http://www.cnn.com/2015/03/13/us/ferguson-next-police-chief/>. As of March 2016, Andre Anderson remains the interim police chief. Jason Hanna, *Ferguson Hires Black Interim Police Chief*, CNN (July 22, 2015, 2:03 PM), <http://www.cnn.com/2015/07/22/us/ferguson-missouri-police-chief/>. Anderson was hired by a new reform-minded City Manager. As Ferguson’s first African-American head of police, albeit temporarily, he “says his main task will be to restore trust.” *Id.*

171. Chanin, *supra* note 98, at 40.

172. Letter from Dep’t of Justice, Civil Rights Division to City Manager John Shaw and Police Chief Thomas Jackson 2 (Mar. 3, 2015) (on file with author).

173. Weichselbaum, *supra* note 5.

174. Chanin, *supra* note 98, at 45.

(2) a lack of confidence in leadership on the department's part. First, rebuilding trust within the Ferguson community will be an arduous feat for the future police chief. With the released DOJ findings, community members have every reason to question officer motivations. This is especially so because former Police Chief Jackson was at the center of efforts to maximize the high fine schedule and pressured officers to write citations to increase and fund the city budget. Breaking the negative association the community has with the FPD, as an organization, will take time, outreach, and a leader who sees the importance of merging federal and local, state power.

Second, motivating the rank-and-file officers in the FPD will be another significant hurdle. Officers in Ferguson know their actions, whether deemed excessive or not, can set off social unrest and no one wants to be the next Darren Wilson.<sup>175</sup> Officer morale can take a big hit if they sense a lack of support from local leadership, which includes both the mayor and police chief. Take the turmoil in New York City for example. Following the Eric Garner grand jury decision, Mayor Bill de Blasio criticized the NYPD, sparking rebellion, work stoppages, and aggression toward the mayor.<sup>176</sup> At funerals for slain officers, killed by a criminal motivated by the Michael Brown and Eric Garner deaths, NYPD officers turned their backs on the mayor and his leadership.<sup>177</sup> Ferguson leaders can learn from the lack of communication and division in New York and ensure local FPD officers find partnership in their municipal leaders.

Scholars argue that "the fact of federal oversight itself . . . can erode morale in a police department, sapping the confidence and spirit that effective policing requires."<sup>178</sup> Re-motivating FPD officers is a matter of setting a tone and laying down the new rules. Many of these officers are impressionable and, depending on who is in charge, will follow suit. "The majority [of police officers] are going to be like soldiers in the Army. And if the general says you treat people with respect and follow the Constitution, that's what you're going to do."<sup>179</sup> While seemingly naïve,

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175. Phillip Swarts, *Police Morale Takes Hit from Events Like Ferguson, Staten Island, Officers Say*, WASH. TIMES (Feb. 22, 2015), <http://www.washingtontimes.com/news/2015/feb/22/police-morale-takes-hit-events-ferguson-staten-isl/>.

176. Jack Linshi, *Mayor Bill de Blasio Under Scrutiny After 2 NYPD Officers Killed*, TIME (Dec. 21, 2014), <http://time.com/3643191/nypd-de-blasio/>.

177. Justin Worland, *Police Turn Their Backs on Mayor During Second NYPD Officer Funeral*, TIME (Jan. 4, 2015), <http://time.com/3652979/deblasio-nypd-funeral/>.

178. STONE ET AL., *supra* note 110, at 6.

179. Leon Neyfakh, *Ferguson Is Hiring*, SLATE (Mar. 20, 2015, 12:41 PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/03/ferguson\\_police\\_chief\\_tom\\_jackson\\_has\\_resigned\\_how\\_will\\_the\\_city\\_replace.html](http://www.slate.com/articles/news_and_politics/crime/2015/03/ferguson_police_chief_tom_jackson_has_resigned_how_will_the_city_replace.html).



this perspective highlights the fact that the entire department in Ferguson, from brass to rank-and-file, must be on the same reform-minded page. For now, however, this aspect of the reform movement remains to be determined. If Ferguson chooses a reform-minded police chief, preferably from outside the current organization,<sup>180</sup> who can inspire change and establish guidelines for implementing the consent decree, change will follow.

#### 4. *Seeing Both Sides and Community Building*

The principal provision of the Ferguson Decree is community policing and engagement.<sup>181</sup> There are many easy adjustments the FPD can make on this front, from implementing community citizen boards to making an effort to engage with the African-American community. Once a line of communication between police and community members is instituted, both sides contributing to the social unrest may realize they are not as different as they claim to be. The outpour of selected sentiments—"Black Lives Matter" from police critics versus "Blue Lives Matter" from police defenders—only strengthens a divide amongst individuals who share common public and personal safety concerns.

In October 2015, the city established a citizen review board to make recommendations to the Ferguson mayor, James Knowles III, and serve as a public check on police conduct.<sup>182</sup> An effective, integrated citizen review board is the initial step to community building. This is especially crucial because the Report offers substantial evidence that Ferguson officials are targeting African-American residents, in addition to evidence that some city officials and officers are blatantly racist.<sup>183</sup> If Ferguson is able to utilize these citizen review boards and communicate effectively with the FPD, the department will begin to learn more about the people they are policing. Specifically, "there are entire segments of the Ferguson community that [police] have never made an effort to know, especially

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180. Ferguson may consider keeping Andre Anderson as the permanent police chief, as he has established the importance of enhancing "the city's recent efforts to get officers to develop positive relationships with people in the areas they patrol." Hanna, *supra* note 170. Anderson also worked in Glendale, Arizona, where bias policing is also a forefront issue. *Id.*

181. Ferguson Draft Consent Decree, *supra* note 137, at 4.

182. *Moving Ferguson Forward*, CITY OF FERGUSON OFFICIAL WEBSITE, <http://www.fergusoncity.com/531/Moving-Ferguson-Forward> (last visited Mar. 27, 2016).

183. FERGUSON REPORT *supra* note 2, at 12. But not all FPD officers agree with or abide by the racist, revenue-centered policing within the department. One FPD officer questioned, "How can you get blood from a turnip" in criticizing the department's scheme of mounting penalties on people who cannot afford them. *Id.*

African Americans who live in Ferguson's large apartment complexes."<sup>184</sup> Most of these segments are low-income communities, contributing to the twenty-five percent of the Ferguson's 21,000 residents qualifying as below the federal poverty line.<sup>185</sup>

As FPD officers welcome community oversight and relationship building with low-income residents, community members will need to have a change in attitude as well. Public shaming of FPD officers is not the long-term answer either. "[Police officers] don't go out every day saying, 'I'm going to take a life today.' They go out saying, 'I want to come home.' They want to come home to their families."<sup>186</sup> This feeling is no different from the mother who fears her son will not make it home because a "bad cop" will be in "the mood for excessive force."

The DOJ recommended giving FPD officers consistent geographical beats so they can get to know a neighborhood. It also suggested that the city think outside the box to create "opportunities for officers to have frequent, positive interactions with people outside of an enforcement context, especially groups that have expressed high levels of distrust of police."<sup>187</sup>

### C. Introducing and Sustaining Reform in Ferguson

Reform in Ferguson is viable, despite the shortcomings that may somewhat stall the process. The pattern-or-practice investigation of the FPD revealed unconstitutional policing and racial bias, but the cash-strapped city of Ferguson may choose to fight reform. While Ferguson may technically embody the workings of an issue organization, the prevalent fear across police and community lines, lack of leadership, and abuse of discretion due to the FPD's culture, will instigate progress. Additionally, the § 14141 investigation uncovered novel aspects that may require reform backup plans in the event that the FPD takes on a more resistant approach—either due to poor leadership or insurmountable costs of reform.

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184. *Id.* at 88.

185. See *QuickFacts: Ferguson City, Missouri*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/2923986> (last visited Mar. 27, 2016).

186. Eric Sandy, 'Sea of Blue' Rally Planned for Saturday in Support of Police, CLEVELAND SCENE (Dec. 26, 2014, 11:44 AM), <http://www.clevescene.com/scene-and-heard/archives/2014/12/26/sea-of-blue-rally-planned-for-saturday-in-support-of-police>.

187. FERGUSON REPORT, *supra* note 2, at 90. The Decree, as currently drafted, states the City of Ferguson will continue the Ferguson Youth Advisory Board, established in 2011, and the Apartment Neighborhood Group. Ferguson Draft Consent Decree, *supra* note 137, at 7. These associations are at the forefront of providing community engagement within the FPD.

The Report unveiled, for the first time in a DOJ pattern-or-practice investigation, unconstitutional and biased practices of a city's municipal courts. For this reason, the Ferguson investigation was even broader than expected, meaning structural reform will require supplemental procedures. No other consent decree has incorporated changes within a city's court system.<sup>188</sup> Because these unique circumstances provide for organizational deficiencies in both the FPD and Ferguson's local judiciary, the DOJ should incorporate both backup plans proposed in this Note to secure reform sustainability.

First, in revising its consent decree with Ferguson, the DOJ should include a follow-up clause that would allow for federal oversight to reappear if the FPD is unable to maintain reforms once the external monitor leaves. This security blanket will enlighten city officials and officers that federalization of the FPD will not end until change is sustained.

Second, Ferguson has the ideal profile for implementation of an auditing system that tracks the execution of reform recommendations adopted by a department. An auditing, or internal monitoring system, allows a department to scrutinize and test its own internal controls over specific police officers actions. Concerned with revenue generation, Ferguson monitored and motivated police officers and court officials to reach various fine and fee quotas. While a form of auditing was present in Ferguson, the motivation was utterly misplaced. Now, it is just a matter of transforming the intent behind Ferguson's self-monitoring process. Replacing a quota-driven mentality with incentives for resolving conflicts without excessive force or unconstitutional arrests would redirect Ferguson's focus to public safety and officer morale. A small department like the FPD can excel with an auditing division given that there is less material to cover and more one-on-one attention for particularly problematic officers. It is likely that with an auditing system, similar to that within the LAPD, progress would follow. This is so long as supervisors review results from internal audits and subsequently reward, commend, or promote complying and community-driven police officers.

## **V. Constitutional Objections to Strong Use of § 14141**

Given the time-consuming nature of reforms and the steep costs of implementing § 14141, many pushback or issue organizations challenge the validity of DOJ intervention, citing constitutional concepts such as judicial federalism. Historically, the Supreme Court maintained that a federal

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188. *Special Litigation Section Cases and Matters*, DEP'T OF JUSTICE, <http://www.justice.gov/crt/about/spl/findsettle.php#police> (last visited Mar. 27, 2016).

judge should not supervise local police departments. In the 1970s and 1980s, three important Supreme Court cases laid barriers to federal involvement in local policing: *O'Shea v. Littleton*, *Rizzo v. Goode*, and most importantly *City of Los Angeles v. Lyons*.<sup>189</sup> All of these cases contained a powerful argument—still echoed by police departments resisting reform today—against all-encompassing DOJ supervision<sup>190</sup> of local police departments, even in the face of race discrimination.

For instance, in *Lyons*, the plaintiff sued the LAPD after a dangerous chokehold rendered him unconscious and injured.<sup>191</sup> He sought damages and injunctive relief against the police department, barring the use of chokeholds as a law enforcement tactic.<sup>192</sup> The Court gracefully punted on the issue. The “recognition of the need for a proper balance between state and federal authority counsels [the Court’s] restraint in the issuance of injunctions against state officers engaged in the administration of the states’ criminal laws in the absence of irreparable injury which is both great and immediate.”<sup>193</sup> Citing *O'Shea* and *Rizzo*, the Court held that federal courts were without jurisdiction to entertain claims for injunctive relief against local police departments engaging in unconstitutional practices.<sup>194</sup>

However, as the findings and documentations of police brutality increased, so did civil rights legislation, which allowed the federal government to intervene where state and local power faltered. Pursuant to its Section 5 remedial powers under the Fourteenth Amendment, Congress may act to prevent potential constitutional violations.<sup>195</sup> That is, Congress has the power “‘to enforce’ by ‘appropriate legislation’ the constitutional guarantee that no State shall deprive any person of ‘life, liberty, or property, without due process of law’ nor deny any person ‘equal protection of the laws.’”<sup>196</sup> Congress used this remedial power when it enacted legislation like § 14141, filling the gap for needed federal DOJ reform of local police departments.

It is well supported that Congress has broad remedial powers where actual constitutional violations have been documented.<sup>197</sup> Unlike *Lyons*

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189. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

190. These cases deal with federal judicial intervention rather than federal executive intervention—but they raise a theme that in an important way cuts across federal branches.

191. *Id.* at 95, 97–98.

192. *Id.* at 95.

193. *Id.* at 112.

194. *Id.* at 95.

195. Evan Tsen Lee, *The Trouble with City of Boerne, and Why It Matters for the Fifteenth Amendment as Well*, 90 DENV. U. L. REV. 483 (2012).

196. *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997).

197. *See id.* at 507.

and its predecessor cases, when enacting § 14141 and other civil rights legislation that empowered DOJ intervention, Congress discovered and maintained actual evidence of race discrimination in local law police departments. Such clear congressional fact-finding was absent in earlier lawsuits like *Lyons*. While some may argue DOJ reform strains against the boundaries of federalism, Congress was at the peak of its remedial powers when it enacted § 14141. That amount of remedial power, paired with the blatant acts of racism that have infiltrated some police departments, outweighs arguments advocating for judicial federalism or local control of law enforcement.

### Conclusion

Pattern-or-practice investigations provide a roadmap for fixing unconstitutional police practices, and if implemented selectively and enforced persistently, will institute incremental change. Reforming the FPD may take nearly a decade. It will be a movement that incorporates revamped training, citizen review boards, body and dashboard cameras, and improvements in community-police relations through mutual understanding. Because Ferguson is a high-stakes organization with deep-rooted discrimination and deficiencies, follow-up procedures will ensure sustainable reform. But, until all these conditions are met, the FPD and the community will remain in danger.

Federal intervention under § 14141 will pressure the FPD to rebuild not only its organizational infrastructure, but also trust within the community, save a series of potential shortcomings. Ferguson's size, finances, and lack of communication between police officers and residents weigh against positive impact of structural reform litigation—at least initially. This heavy weight, however, can be counterbalanced with effective backup plans for institutionalizing reform post federal monitoring.

Still, the question of power remains: does pattern-or-practice reform go too far in federalizing the police? Yes, criminal justice is typically viewed as a “local issue,” but federal intervention is sometimes the only ball left in the air. The situation in Ferguson epitomizes this. When Officer Darren Wilson was found innocent of any legal wrongdoing in the Michael Brown shooting, a § 14141 top-down investigation of the FPD was the last push to change a detrimental police culture. Forcing local departments to own up to unconstitutional policing sets an example, threatens exposure, and allocates resources to desperate law enforcement agencies. Where, as the case was here, local government does not have the resources or the resolve to ensure a fair proceeding or the implementation of sustainable reform, a stronger, sharper, federal tool is needed. That need grows even

stronger where a community lacks trust in its local officials to conduct a complete investigation. With problems of bias, inadequate resources, and community distrust affecting departments across the country, § 14141 is the only federal tool strong enough to combat these challenges head on. In turn, the DOJ can effect great change and ensure long-term, sustainable improvement of police practices for the betterment of all parties involved.<sup>198</sup>

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198. Rushin, *supra* note 34, at 1347–48 (reporting that and despite only sixty-five interventions of over 18,000 agencies, where implemented, these reforms have impact with “nearly one in five Americans is served by a law enforcement agency that has been subject to a [DOJ] investigation via § 14141”).

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